APPEAL NO. 030174
FILED MARCH 10, 2003

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on December 18, 2002. The hearing officer resolved the disputed issues by deciding that the appellant's (claimant) impairment rating (IR) cannot be determined and that a second designated doctor should be appointed by the Texas Workers' Compensation Commission (Commission). The claimant appealed, contending that the hearing officer's findings regarding the designated doctor are against the great weight and preponderance of the evidence and that the hearing officer's decision is incorrect as a matter of law. In its response, the respondent (self-insured) requests that we affirm the hearing officer's decision or, in the alternative, if a second designated doctor is not appointed, then the Appeals Panel should adopt the IR assigned by the treating doctor or the IR assigned by the self-insured's required medical examination (RME) doctor.

DECISION

Affirmed.

The disputed issue at the CCH was the claimant's IR. The claimant sustained a compensable left knee injury on _____. The claimant was examined by the self-insured's RME doctor in February 2001, and he reported that the claimant had full range of motion (ROM) of the left knee and a probable left knee posterior horn medial meniscal tear. The claimant underwent a left knee partial medial meniscectomy and chondroplasty of the medial compartment in August 2001.

The claimant's treating doctor examined the claimant on January 29, 2002, and reported that the claimant reached maximum medical improvement (MMI) on January 29, 2002, with a 12% IR. The treating doctor used the Guides to the Evaluation of Permanent Impairment, published by the American Medical Association (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the AMA prior to May 16, 2000) (AMA Guides), in assessing the IR. The treating doctor assessed 4% impairment under Table 41 for ROM and 8% impairment under Table 62 for arthritis impairment. Table 41 relating to knee impairments for motion provides whole person impairments of 4% for mild, 8% for moderate, and 14% for severe. With regard to flexion motion, the 4% for mild is assessed for less than 110 degrees. The treating doctor's report states that his ROM examination disclosed flexion of 130 degrees and extension of 0 degrees. Since the flexion motion was not less than 110 degrees, it is not known why the treating doctor assessed impairment under Table 41.

The claimant was then examined on February 19, 2002, by the designated doctor appointed by the Commission, and the designated doctor reported that the claimant reached MMI on February 19, 2002, with a 16% IR. The designated doctor assessed the IR under the fourth edition of the AMA Guides. The parties stipulated that the

claimant reached MMI on February 19, 2002. The designated doctor noted that he assessed impairment under Table 41 for ROM and that the claimant had 70 degrees of knee flexion and a flexion contraction of 10 degrees. The designated doctor wrote that he elected to use ROM for the IR because of what he believed was an extended amount of time the claimant waited for surgery, which, he wrote, contributed to further degeneration of the left knee.

The self-insured's RME doctor examined the claimant again on April 22, 2002, and he reported that the claimant has a 4% IR. The RME doctor used the fourth edition of the AMA Guides. The RME doctor used two methods to arrive at the 4% IR. The first method was to assess 4% impairment under Table 41 for ROM. The second method was to assess 3% impairment under Table 62 for arthritis and combine that impairment with 1% impairment under Table 64 for a partial medial meniscectomy. The RME doctor wrote that the treating doctor had inappropriately added Table 62 impairment to Table 41 impairment. The RME doctor noted that the claimant's left knee ROM was from 5 degrees to 110 degrees.

On July 18, 2002, the Commission sent a letter of clarification to the designated doctor indicating that an April 22, 2002, letter from the RME doctor was attached and requesting the designated doctor to review the letter and reply to the information in the letter. The Commission asked the designated doctor if the information would change his opinion on the claimant's MMI date and IR. Although the record does not contain an April 22, 2002, "letter" from the RME doctor, we note that the RME doctor's IR report is dated April 22, 2002.

In a letter dated July 22, 2002, the designated doctor wrote that it appeared that the claimant had an RME after his evaluation of the claimant and that the RME doctor found different ROM than he had found. The designated doctor wrote that he is standing by his examination findings and that the information did not change his opinion on the MMI date and IR.

The hearing officer found that the designated doctor had failed to explain the differences between his ROM findings and the ROM findings of the treating doctor and the RME doctor. The hearing officer also found that the great weight of the medical evidence that was contrary to the designated doctor's 16% IR consisted of the wide variance in ROM results, the failure of the designated doctor to explain his choice of rating method, and the failure of the designated doctor to explain the wide variation in ROM. The hearing officer determined that the correct IR could not be determined from the evidence and that a second designated doctor should be appointed. We note that, while not mentioned by the hearing officer in his decision, Section 3.2e, at page 77 of the fourth edition of the AMA Guides, states, with reference to ROM of the lower extremity, that evaluating permanent impairment of the lower extremity according to its ROM is a suitable method, and that, if multiple evaluations exist, inconsistency of a grade between the findings of two observers, or on separate occasions by the same observer, makes the results invalid.

Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that, if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors.

Upon finding that the great weight of the other medical evidence was contrary to the designated doctor's certification of a 16% IR, the hearing officer did not adopt the IR of one of the other doctors, but instead decided that a second designated doctor should be appointed. In Texas Workers' Compensation Commission Appeal No. 011607, decided August 28, 2001, the Appeals Panel noted that it has held that a designated doctor should not be replaced by a second designated doctor absent a substantial basis to do so, and that normally the appointment of a second designated doctor is appropriate only in those cases where the first designated doctor is unable or unwilling to comply with the required AMA Guides or requests from the Commission for clarification, or if he or she otherwise compromises the impartiality demanded of the designated doctor. The Appeals Panel also noted in Appeal No. 011607 that in limited cases, the hearing officer has the option of going back to the designated doctor for a second or third clarification or to adopt the IR of another doctor which is valid or to consider the appointment of a second designated doctor, if it was determined that the designated doctor was unable or unwilling to comply with the AMA Guides.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

We affirm the hearing officer's decision and order.

The true corporate name of the insurance carrier is **AMERICAN TELEPHONE & TELEGRAPH (a certified self-insured)** and the name and address of its registered agent for service of process is

CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.

_____
Robert W. Potts
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Michael B. McShane
Appeals Panel
Manager/Judge